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U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals
INDEX

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Date:
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In re: ROMAN LISANSKY

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stanley Wallenstein, Esquire
130 William Street
New York, New York 10038

ON BEHALF OF SERVICE: Theodore J. Murphy
Assistant District Counsel

APPLICATION: Bond redetermination

The Immigration and Naturalization Service has timely appealed an Immigration Judge's December 21, 1998, decision granting the respondent's request for a change in custody status and ordering the respondent's release on a $1,500 bond condition. The Service asserts that the respondent is an arriving alien, and that the Immigration Judge consequently lacked jurisdiction to redetermine conditions of his custody. We agree, and will dismiss the appeal for lack of jurisdiction.

The respondent, a 23-year-old native and citizen of Russia, was admitted as a lawful permanent resident in 1980. On November 16, 1998, the respondent disembarked at John F. Kennedy Airport in New York on his return from a brief visit to Switzerland with his family. He was detained by the Service and removal proceedings were initiated based on his conviction, on September 8, 1995, for criminal possession of forged instruments in the second degree, a class D felony, pursuant to section 170.25 of the New York State Penal Law.

Section 170.25 provides that "[a] person is guilty of criminal possession in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10." The respondent was charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as having been convicted of a crime involving moral turpitude.

The current regulations relating to the detention and release of aliens remove from Immigration Judges the authority to redetermine the custody conditions of "[a]rriving aliens in removal proceedings." 8 C.F.R. § 3.19(h)(2)(i)(B). Moreover, unlike the classes of aliens referred to in paragraphs (C), (D), and (E) of § 3.19(h)(2)(i) who likewise fall outside the Immigration Judge's custody jurisdiction, the regulation does not confer upon Immigration Judges even the limited jurisdiction to entertain the request by an alien, who has been designated by the

Service as an arriving alien, for a determination by an Immigration Judge of whether or not the alien is "properly included" within that paragraph. 8 C.F.R. § 3.19(h)(2)(ii). *See generally, Matter of Joseph*, Interim Decision 3387 (BIA 1999). The jurisdiction of Immigration Judges and this Board is circumscribed by regulation. Thus, if the respondent is an arriving alien, the Immigration Judge was without jurisdiction to redetermine the custody conditions imposed by the Service, and the review process described in 8 C.F.R. § 236.1(d) does not apply. 8 C.F.R. § 236.1(c)(11) (1999). *See also Matter of Osewiusu*, Interim Decision 3344 (1998).

The term "arriving alien" is defined in 8 C.F.R. § 1.1(q) (1999), which provides, in relevant part, that: "The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry. . . ." The respondent's attempt to reenter the United States at John F. Kennedy airport satisfies the latter component of the arriving alien definition. The question remains whether the lawful permanent resident respondent is "an applicant for admission" satisfying the first condition of § 1.1(q).

Section 101(a)(13) of the Act, as amended by section 301 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, provides that a lawful permanent resident is "not to be regarded as seeking an admission into the United States" unless one of the stated exceptions applies. *See Matter of Collado*, Interim Decision 3333 (BIA 1997, amended 1998). Thus, in the absence of one of the exceptions, a lawful permanent resident is not considered to be an "applicant for admission," and therefore is not an "arriving alien." One of the exceptions which will relegate a lawful permanent resident to the status of an applicant for admission is the commission of "an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a) [1182 or 1229b]." Based on this record, it does not appear that the respondent has previously been granted relief under section 212(h) or 240A(a). Accordingly, applying section 101(a)(13) of the Act and 8 C.F.R. § 1.1(q), we conclude that the respondent is properly treated as an arriving alien for custody and bond purposes.

The regulatory history of the current regulations clearly evidences the Department's intent to treat lawful permanent residents who fit within one of the exceptions stated in section 101(a)(13)(C)(i)-(iv) of the Act as "arriving aliens" for custody/bond purposes. The history states that such lawful permanent residents are "subject solely to the parole authority of the Service." *See* Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27441, 27446-47 (May 19, 1998).

The Immigration Judge's decision to terminate the respondent's removal proceedings based on his conclusion that the respondent's offense is not a crime involving moral turpitude does not serve to change the respondent's status as an arriving alien. The Service's appeal from that decision remains pending before the Board, and he thus remains in removal proceedings under a charge of inadmissibility. The ultimate question of whether the respondent's conviction is for a crime involving moral turpitude, which will also answer whether the Service correctly charged him with a ground of inadmissibility as a lawful permanent resident who is "seeking an admission," will properly be resolved when the Board adjudicates the Service's merits case appeal. It is not new in immigration law for an alien to be subject to a less favorable, or at least different, set of rules than he or she would otherwise face if certain facts could be definitively

established prior to the Service's decision to charge with a ground of inadmissibility instead of deportability. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Supreme Court found that, since the lawful permanent resident in that case was not clearly and beyond a doubt entitled to enter the United States, it was not improperly "circular" to make the determination of whether the lawful permanent resident was, in fact, seeking "entry" in exclusion proceedings, even though exclusion proceedings did not offer the same procedural protections as deportation proceedings would have. Similarly, the question of whether this respondent was correctly designated as an "applicant for admission" will not be finally determined until we decide in the merits case appeal whether the offense is a crime involving moral turpitude. Until then, the respondent remains in proceedings in the status of an "arriving alien." *See Matter of Collado*, *supra* (discussing Congress' replacement of the "entry" concept with that of seeking "admission" with respect to certain lawful permanent residents described in section 101(a)(13) of the Act.)

We emphasize that this case presents a different situation than that addressed in *Matter of Joseph*, Interim Decision 3398 (BIA 1999). In the circumstances presented in that case, the regulations specifically accorded to the Immigration Judge, and consequently to this Board upon appeal from the Immigration Judge's decision, jurisdiction to review whether the lawful permanent resident was properly included within the category of aliens subject to section 236(c)(1) mandatory detention. In *Joseph*, the lawful permanent resident alien was *not* "coming or attempting to come into the United States at a port-of-entry," and thus was not an arriving alien. The review process provided in the regulation for the Immigration Judge's custody determination in that case simply does not apply to an arriving alien, irrespective of whether or not he is a lawful permanent resident, and irrespective of whether or not his offense is one that is properly included in section 236(c)(1). 8 C.F.R. § § 3.19(h)(2); 236.1(c)(11), (d). Since the Immigration Judge did not have jurisdiction to conduct a bond proceeding to determine whether the respondent was properly included in 8 C.F.R. § 3.19(h)(2)(i)(B) as an "arriving alien," we will vacate his custody order and dismiss the appeal for lack of jurisdiction, and return the record to the Immigration Court for any further action that may be necessary.

ORDER: The Immigration Judge's custody order is vacated, the appeal is dismissed, and the record is returned to the Immigration Court.

FOR THE BOARD